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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 563

EMPIRE TRUST COMPANY, as Trustee under Indentures securing debentures of ASSOCIATED GAS AND ELECTRIC CORPORATION, due 1973,

Petitioner,

vs.

DENIS J. DRISCOLL and WILLARD L. THORP, as Trustees of ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ALLEN E. THROOP,
Attorney for Denis J. Driscoll and Willard L. Thorp, Trustees of Associated Gas and Electric Corporation, Debtor, Respondents.

E. ROBERT WILLCOX,
FELIX TAUBENBLATT,
Of Counsel.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 657-664) is reported in 137 F. (2d) 603. The opinion of the United States District Court for the Southern District of New York (R. 554-596) is not reported.

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under § 240(a) of the Judicial Code, 28 U. S. C. A. 347(a), and § 24c of the Bankruptcy Act, 11 U. S. C. A. § 47c. The judgment of the Circuit Court was dated September 29, 1943. The petition for a writ of certiorari was filed on December 29, 1943.

Statement

In 1933 Associated Gas and Electric Corporation (herein called the Corporation) created two issues of unsecured debentures. Interest on the debentures was payable semi-annually at the office or agency of the Corporation in New York City. From 1933 until the filing on January 10, 1940 of the Corporation's petition for reorganization under Chapter X of the Bankruptcy Act, funds for the payment of each installment of interest were deposited by the Corporation with its paying agent a few days in advance of the date upon which such installment became due. Prior to 1937, all such deposits were made with the Corporation's paying agent, Transfer and Coupon Paying Agency (a New Jersey business trust, herein for brevity called Traco).

On November 8, 1934, the following instructions were lodged with, and accepted by, Traco (R. 314):

"ASSOCIATED GAS AND ELECTRIC SYSTEM
Principal Office
Ithaca, New York

NOVEMBER 8, 1934.

Please address reply to
Room 2401, 61 Broadway
New York.

TRANSFER AND COUPON PAYING AGENCY,
30 West Blackwell Street,
Dover, N. J.

Gentlemen:

We have heretofore from time to time deposited with you, as paying agent, funds for the payment of interest on securities of this Company.

This is to advise you that any amount of such deposits remaining with you are to be held in trust by you for the holders of such securities to whom the interest is payable, for a period of one year from the date hereof.

Will you please indicate in the space provided below your acceptance of these instructions.

Very truly yours,

ASSOCIATED GAS AND ELECTRIC CORPORATION
By J. LEE RICE, JR.,
Treasurer.

The undersigned agrees that the funds referred to above will be held in trust by it in accordance with the above instructions.

TRANSFER AND COUPON PAYING AGENCY,
By R. N. THOMPSON,
Vice-President."

On the same day, November 8, 1934, the Corporation deposited with Traco $1,071,069.74 and the following in-

structions were lodged with, and accepted by, Traco (R. 315):

"ASSOCIATED GAS & ELECTRIC SYSTEM
Principal Office
Ithaca, New York.

NOVEMBER 8, 1934.

Please address reply to
Room 2401, 61 Broadway,
New York.

TRANSFER AND COUPON PAYING AGENCY,
30 West Blackwell Street,
Dover, N. J.

Gentlemen:

We hand you herewith checks to your order totalling $1,071,069.74. These checks are delivered to you to pay interest adjustments under the Plan of Rearrangement of Capitalization of Associated Gas and Electric Company due November 15, 1934 in the amount of $4,476.56, and interest due December 1, 1934 on the 4½% and 5% Debentures, due 1973, of this Corporation in the amount of $1,066,593.18.

These funds are deposited with you to be held in trust by you for the holders of our debentures to whom the interest is payable and are to be held in such trust for the period of one year from December 1, 1934.

Kindly acknowledge the receipt of these funds in the space provided at the bottom of this letter.

Very truly yours,

ASSOCIATED GAS AND ELECTRIC CORPORATION,
By J. LEE RICE, JR.,
Treasurer.

Receipt of the above remittance is acknowledged. It will be held in trust by the undersigned as provided above.

TRANSFER AND COUPON PAYING AGENCY,
By R. N. THOMPSON,
Vice-President."

In January 1937 *all* funds held by Traco for the payment of unclaimed interest were withdrawn from Traco and deposited with the Corporation's new paying agent, Transfer and Paying Agency (another New Jersey business trust, herein for brevity called Trapa). Funds for the payment of subsequent installments of interest were deposited with Trapa.[1]

Until the filing by the Corporation of its petition for reorganization checks for the payment of registered interest were issued by the Corporation's paying agent and paid upon presentment. All coupons were either paid by the paying agent upon presentment or checks therefor issued that were paid upon presentment.

On January 10, 1940, the date of filing of the petition for reorganization, coupons and checks that had not been presented for payment aggregated $192,550.65 and funds in that amount were on deposit with Trapa. At that time Trapa also had on deposit funds held by it as paying agent for other corporations. No interest on securities of the Corporation was paid by Trapa after January 10, 1940. On

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[1] Petitioner states on page 2 of its petition that the Corporation during the years 1932-1939 caused more than $141,000,000 of interest to be paid into and disbursed from these "special accounts" to holders of its debentures. The statement is incorrect. The years referred to should have been 1935 to 1940 (R. 195). The figure of $141,000,000 includes funds disbursed from the same accounts for the payment of interest on debentures of a number of other corporations for which Trapa was paying agent (R. 195, 254-269). Petitioner uses the term "special account" 36 times in its petition and brief but such term does not appear in any indenture, agreement, transmittal letter, intra-corporate memorandum, journal entry, ledger or other record. The only appearance of the term is in affidavits (R. 254-269) filed by the treasurer of the Corporation and the treasurer of Trapa with the Bureau of Internal Revenue in order to obtain certificates of non-attachment pursuant to which funds held by Trapa were returned to the corporations from which Trapa had received them.

February 5, 1940, Trapa ceased its paying agency business, and subsequently all funds that were on deposit for the payment of interest were returned to the corporations that had deposited them, said $192,550.65 and certain other funds not here involved being assigned to respondents herein as reorganization trustees of the Corporation subject to such rights, if any, as the holders of outstanding coupons and checks might be determined to have (R. 122, 238-248). Respondents filed a petition in the reorganization proceedings to determine the status of various funds, including the funds here involved.

The District Court made the following finding of fact (R. 619-620):

> "3. Prior to November 8, 1934 Transfer and Coupon Paying Agency was only a paying agent and none of the funds deposited with Transfer and Coupon Paying Agency were intended to be held or were held in trust for holders of coupons or interest checks issued with respect to the Debtor's Income Debentures or Convertible Debentures and no part of the undisbursed funds held by Transfer and Coupon Paying Agency was ever demanded or received by the Debtor. Nothing in the relationship between the Debtor and Transfer and Coupon Paying Agency occurred to change definitely that relationship until November 8, 1934, when the Debtor sent to Transfer and Coupon Paying Agency the letters, dated November 8, 1934, of the Debtor (Tr. Ex. AA-1 and 2).[2] Transfer and Coupon Paying Agency accepted the trust conditions specified in said letters. The Debtor's intention that the accumulating funds should be held by Transfer and Coupon Paying Agency as trust funds was formed and expressed on November 8, 1934, and continued from that date to January 10, 1940. After November 8, 1934, the Debtor forwarded to Transfer and Coupon Paying Agency, and after January 1937 to Transfer and Paying Agency, further sums to meet the interest as it accrued on the Debtor's securities in coupon and registered form,

[2] These are the letters printed at pages 3 and 4 of this brief.

> and no part of the undisbursed funds held by Transfer and Coupon Paying Agency or Transfer and Paying Agency was ever demanded or received by the Debtor. Prior to November 8, 1934, during the one year periods specified in said November 8, 1934 letters, and after the expiration of said one year periods the Debtor in all respects treated said funds as beyond the control of the Debtor, and the treatment by the Debtor of said funds, which was the same treatment as that accorded said funds prior to November 8, 1934, was in all respects consistent with the holding by Transfer and Coupon Paying Agency and Transfer and Paying Agency of said funds under a continuing trust."

The reorganization trustees of the Corporation, respondents herein, appealed, contending that the finding that a trust continued from November 8, 1934 to January 10, 1940 was not justified by the evidence. The Circuit Court of Appeals per Swan, C. J. stated "We think this contention is sound" (R. 662).

Question Presented

The Circuit Court of Appeals decided that circumstances did not show that a trust was intended to be created of funds deposited with the Corporation's paying agent for the payment of interest on unsecured debentures, and hence, that such funds constituted general assets of the Corporation's estate and not trust funds for debenture holders who had failed to claim their interest prior to the institution of proceedings for the reorganization of the Corporation.

The question presented is whether the decision that no trust existed was a determination of an important question of local law in probable conflict with applicable local decisions.[3]

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[3] Rules of the Supreme Court, Rule 38, Subdivision 5(b).

ARGUMENT

POINT I

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

Petitioner's First Point is that the decree conflicts with applicable decisions of this Court and of the New York Court of Appeals. Four cases are cited, *McKee* v. *Lamon*, 159 U. S. 317 (1895), *People* v. *The City Bank of Rochester*, 96 N. Y. 32 (1884), *Shawmut Corp.* v. *Bobrick Sales Corp.*, 260 N. Y. 499 (1933) and *Sayer* v. *Wynkoop*, 248 N. Y. 54 (1928).

In the *McKee* case the fact that a trust existed was not in issue. The only question presented was whether Lamon was a beneficiary. The settlor of the trust was not a party to the action.

The *People*, *Shawmut* and *Sayer* cases involve, petitioner asserts, "factual situations indistinguishable from the facts in this case". None of these cases involved paying agencies or interest payments. None deals even remotely with circumstances like those presented herein nor was any of them decided against the depositor.

What rule of law enunciated in these cases is being relied upon is not clear. If petitioner is asserting that these cases hold that funds deposited with a paying agent for payment to others may not be returned to the depositor, the *People* case is to the contrary as it squarely holds that:

> "The bank was bound to hold the money for and apply it to that purpose, and no other, or failing to do so, return it to the petitioner."

In *Matter of Arcadia Trust Company*, 240 App. Div. 166, 168 (4th Dept., 1934), the Appellate Division cited the

People case and the *Shawmut* case in support of its ruling that funds deposited for "the sole and specific purpose of paying coupons about to become due on the bonds and by their terms payable at the office of the trust company" remain the property of the depositor. In the case of *In re Kountze Bros.*, 103 F. (2d) 785 (2 Cir., 1939), cert. den. sub nom. *Los Angeles* v. *Irving Trust Co.*, 308 U. S. 586 (1939), dealing with funds deposited with a paying agent, the *People* and *Shawmut* cases were expressly distinguished, the Court stating (at page 789):

> "In those cases which we consider controlling it is held that no trust is created for the benefit of coupon holders merely by reason of a deposit for the special purpose of paying interest on bonds. *Staten Island Cricket & Baseball Club* v. *Farmers Loan & Trust Co.*, 41 App. Div. 321 (2d Dept., 1899); *Noyes* v. *First National Bank of New York*, 180 App. Div., 162 (1st Dept., 1917), affirmed 224 N. Y., 542; *Erb* v. *Banco di Napoli*, 243 N. Y. 45 (1926)."

In the *Sayer* case, an action was brought on behalf of the State Insurance Fund against Wynkoop to recover money that Metropolitan By-Products Company had deposited with Wynkoop for payment of premiums on certain Workmen Compensation insurance issued to the By-Products Company. The depositor was not a party to the action. The New York Court of Appeals held that Wynkoop was the "trustee or agent for the [creditor] State Insurance Fund" and not the agent of the depositor.

The local decisions cited by petitioner do not hold that a bailee should not return to his bailor money not applied for the purpose for which it was deposited. In so far as petitioner's cases are applicable at all they hold that undisbursed money must be returned by a bailee to his bailor-principal.

Petitioner's Second Point is that a trust for one year is contrary to the provisions of § 11 of the New York Per-

sonal Property Law[4]; that the Circuit Court of Appeals held funds here involved to have been impressed with a trust for one year; and that such holding is accordingly in conflict with applicable local decisions. Under the New York Personal Property Law the absolute ownership of personal property must not be suspended for a term of years. There has been in this case no suspension of absolute ownership of any personal property because there has been no restriction against payment of the funds. The Corporation's paying agent was instructed to pay interest as it became due and was claimed. In *Walsh* on *Future Estates in New York*, § 28, page 167, the law of New York is succinctly stated as follows:

> "If the trustee is expressly given the power to convey and distribute the proceeds at any time, thereby ending the trust, there is no suspension of alienation and the trust is good, no matter how many lives are involved."

In the instant case during the one year periods that the paying agent acted as trustee, it was not only given the power to convey and distribute, it was expressly directed to make such conveyance and distribution.

Even if the one year trusts were invalid, as contended by petitioner, the decision of the Circuit Court of Appeals would be correct in result, for it would follow that the settlor or his representatives (respondents herein) could reclaim the funds from the "trustee". Petitioner attempts to escape this result by urging that the one year limitation

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[4] This section is found in 40 McKinney's Consolidated Laws of New York, Annotated, Personal Property Law, § 11. So far as pertinent here, it reads as follows: "Suspension of ownership. The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition * * *."

on the trust be stricken out. In other words, it requests this Court to establish a trust forever, on the ground that a trust for one year is too long.

In its Third Point petitioner avoids employing the language of trusts and asserts that the funds in question were subject to an "irrevocable bailment". Petitioner's argument is that

> "If the paying agency is not coupled with a debtor-creditor relationship terminable at will, as in the bank-depositor cases from which this case is distinguishable, but is coupled with an agreement that the funds in question shall be paid to third parties, an irrevocable bailment results."

How petitioner arrives at the strange conclusion that funds transmitted to an agent for disbursement leave the control of the depositor, while funds transmitted to a bank for that purpose do not, does not appear. Petitioner's quotation from *Sayer* v. *Wynkoop*, 248 N. Y. 54, 58 (1928) sheds no light on the matter. In that case the Court of Appeals held that it is the intention of the owner and not that of the receiver that is controlling upon the question whether title to property has been transferred and a trust created. The Court of Appeals found the decisive factor in the *Sayer* case to be that the depositor parted with control of his funds when he delivered them, not to his own agent, but to the agent of the State Insurance Fund to which he owed the money. In the instant case neither Traco nor Trapa promised the debenture holders that it would act for them.

It is submitted that the Circuit Court of Appeals was correct in determining that the evidence did not justify holding that the depositor intended to part with control of the funds in question. There is no support in the Record or in the authorities for petitioner's argument that such funds were the subject of an "irrevocable bailment".

POINT II

The question decided by the Circuit Court of Appeals is a question of fact and therefore not of such character as to warrant review by this Court.

A. THE QUESTION DECIDED IS A QUESTION OF FACT. In order for the funds involved in this case to constitute trust funds for a special class of creditors the Corporation must have formed and expressed an intention that such funds were to be held in trust. The intention of the depositor is controlling. Both the District Court and the Circuit Court of Appeals state this to be the law of New York, and petitioner does not challenge that such is the law of New York. It is a question of fact whether there was any such intention. No promise, representation or suggestion that the Corporation had created or would create a trust for the payment of interest is contained in any of the Corporation's indentures, debentures, coupons, checks, bookkeeping records, vouchers, transmittal letters or memoranda. If a trust is to be deemed to exist it must be inferred from circumstances, as distinct from an express trust. In *Beaver* v. *Beaver*, 117 N. Y. 421, 428 (1889), Judge Andrews of the New York Court of Appeals stated that if a trust is to be inferred from circumstances, the circumstances must be such as will "show beyond a reasonable doubt that a trust was intended to be created." Judge Andrews continues:

> "It would introduce a dangerous instability of titles, if anything less was required or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention."

Petitioner asserts (page 12 of its petition) that the Circuit Court of Appeals erred in that it heid that the transfer in 1937 from the old paying agent to the new affected the nature of the bailment with respect to those

funds and funds thereafter transmitted. The Circuit Court's holding is that the transfer is additional evidence of the Corporation's intent not to continue a trust of the interest moneys after the one year periods. The District Court inferred that the Corporation intended to impress a trust upon the funds deposited with Trapa. The Circuit Court of Appeals held:

> "That the Corporation intended to impress a trust upon the funds deposited with Trapa can be but an inference drawn from the proven facts. And it is one which need not necessarily be drawn, for the facts are at least equally consistent with an intention on the Corporation's part to make Trapa merely its paying agent."

B. A DECISION INVOLVING MERELY A DETERMINATION OF A FACTUAL ISSUE DOES NOT WARRANT REVIEW BY WRIT OF CERTIORARI. There is no general principle or question of law involved in the decision of the Circuit Court of Appeals. The present petition therefore falls squarely within the rule announced by this Court in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938):

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508, 509 (1924) this Court said:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

In *United States* v. *Johnston*, 268 U. S. 220, 227 (1925) this Court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."

Conclusion

The decision of the Circuit Court is correct. It is not in conflict with the law of New York. Furthermore, the decision is a determination of a question of fact and is applicable only to particular circumstances. Respondents therefore respectfully request that the petition for a writ of certiorari be denied.

Dated: January 19, 1944.

Respectfully submitted,

ALLEN E. THROOP,
Attorney for Denis J. Driscoll and Willard L. Thorp, Trustees of Associated Gas and Electric Corporation, Debtor, Respondents.

E. ROBERT WILLCOX,
FELIX TAUBENBLATT,
Of Counsel.